No. 11,028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

NORTHWEST POULTRY AND DAIRY PRODUCTS COMPANY (an Oregon corporation), and C. W. NORTON, President,

Appellees.

BRIEF FOR APPELLEES

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SUBJECT INDEX

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STATEMENT OF FACTS

On or about the 1st of August, 1944, the Appellant determined that an investigation of the books and accounts of the Appellees was necessary in connection with the enforcement of Regional Order G-93 issued on May 17, 1944, "to discover whether or not Respondents had complied and are complying with the provisions of the Act and of said Orders." (Tr. 342)

A request was made that the Appellees permit the inspection and copying of their records relating to the

"purchase, sale and disbursements, covering the sale and purchase by Respondents of all turkeys purchased and sold by them between the dates of May 8, 1944 and August 10, 1944 ***." (Tr. 342) It is alleged in paragraph VI of the application (Tr. 343) that the Applicant believed that Appellees records "constitute evidence which is competent, relevant and necessary in the said investigation and that such investigation is essential to the enforcement and administration of the Act and of Revised Maximum Price Regulation 269, as amended, and Regional Order G-93."

The Appellees made a return to the Order to Show Cause (Tr. 3) and set out in full Order G-93, together with the definitions appended to it. The order among other things provided as follows:

> "The above prices are the **only** prices which may be charged for processing services. Any charge of less than the prices fixed in this Order will be considered an attempt to evade Revised Maximum Price Regulation 269. Charges of more than those prices would be in outright violation of this Order."

Later, the Appellees filed an answer to the application, wherein it is alleged that the Appellees believed that Order G-93 is void for various reasons (Tr. 15) and deny certain of the allegations of the application. In a separate and affirmative answer, (Tr. 16) the

Appellees pleaded, among other things, that a custom had existed in the trade for a long time for handling turkeys on a per head basis at certain prices. Reference is then made to Order G-93 and the definitions relating thereto, the chief departure from the above custom being that turkeys must, under the order, be handled on a per pound basis charged to the growers, which, it is alleged, would amount to such an excessive charge that the growers would not submit to it.

It is alleged that on October 2, 1944, there was issued from the OPA office in Washington a regulation which permitted the Appellees and those in a like position to handle turkeys as agents for the growers, and that, ever since the issuance of this regulation, the Appellees had complied with it and were continuing to do so. (Tr. 20).

Paragraph XII of the Answer (Tr. 20) reads as follows:

> "Previous thereto the respondents had not complied with said Order G-93 for the reason that they could not do so without jeopardizing their said business."

Paragraph XIII reads as follows: (Tr. 20)

> "As a result of said modification of order G-93 no reason remains for the application herein for the examination of the books, records and accounts of the respondents, unless the applicant is seeking

evidence to be used as a basis for a complaint in an action for damages against the respondents for an alleged violation of the Emergency Price Control Act and regulations thereunder or as a basis for a criminal prosecution of the respondents for such alleged violations."

Respondents pleaded (Tr. 21) and proved without dispute that they are amply able to respond in any damages that might be assessed against them.

Miss Gallagher (Tr. 52) stated, in effect, that the Appellant wished to look at the records of the Appellees to build up a case against them and (Tr. 72) she said "So far in this situation we have no information on which to base the proper kind of a lawsuit." This specific Regional Order G-93 was considered by a large number of growers from Washington and Oregon at a meeting held in Portland on September 11, 1944, at the request of the OPA (Tr. 64) and was declared to be unreasonable and should not be enforced. Certain changes were suggested to make it workable (Tr. 65).

At page 66 of the transcript there is a letter addressed by the head of the National Turkey Federation to Mr. Haldeman of the OPA, dated September 18, 1944, wherein G-93 is analyzed and it is contended that it is unreasonable and unworkable and should be revoked, it being stated that the attempt to enforce it is the

result of the vanity or poor judgment of the one person who issued it.

At page 71 of the transcript, Miss Gallagher stated that if the inspection were allowed, "Then we could bring an injunction suit in order to ask him to be enjoined."

Mr. Norton (Tr. 126) explained in detail the result of compliance with this order, stating that under it there would have to be a raise in the charge to the grower of an average of 40c a head. At page 129 of the transcript he testified that since the order went into effect on May 8th, "there has been nothing but confusion among everyone, dealers and growers alike." He said that this applied to the entire state, except the cooperatives.

Mr. Norton further testified (Tr. 130):

> " Well, it is unbelievable to me that an order of that kind could possibly come out where it sets a minimum charge that we had to charge a grower, setting up a price in excess of what it cost us to do that job, was beyond me. I still can't believe that an order of that kind could come out."

He further testified (Tr. 136) that the order had been modified so as to allow the wholesaler-processor to act as an agent for the grower and that (Tr. 139) under this modification, "We will be right back to where we

were before this order came out, before G-93 here ever came into existence." See plaintiff's exhibit 3 (Tr. 286).

Mr. Norton testified (Tr. 121) regarding the custom existing in the trade before the promulgation of OPA regulations that,

> "The custom ever since the processors and wholesalers started to dress turkeys has been to buy the turkeys from the growers on the dressed weight and grade, and charging the growers for the service, picking and/or hauling, whichever the case may be, or both. If the grower hauled his own turkeys in you wouldn't charge him for the hauling. If you hauled them in for him, you would charge him both for the hauling and dressing.
>
> Q. Was that a per head basis?
> A. The hauling and dressing was all on a per head basis.

He further testified (Tr. 122) that before the OPA regulations came in the charge for this service was 23c on hens and 25c on toms, and (Tr. 123) that this charge was raised to 25c and 28c per head. Mr. Norton further stated (Tr. 126) that under G-93 the per head charge came to as much as 72c per head on toms amounting to an average raise of 40c a head.

He further testified (Tr. 128) that since July, 1944, there was an embargo on turkeys so that all must go to the armed forces.

"There can't be a pound sold outside of that—their care; and that has been on, in fact, that order was on when this G-93 came into existence. We were compelled at that time to sell to the army and the growers were compelled to sell through a licensed dealer."

He further testified (Tr. 128):

"Since last May it has been in the shape it is now. The growers are simply holding back. They don't want to sell. In the meantime the war pool is right on our heads trying to get turkeys for our armed forces. If we are going to have to feed them overseas we have to get turkeys and since this order has been in effect, May 8th, there has been nothing but confusion among everyone, dealers and growers alike."

He said the same situation existed in the State of Washington. Mr. Norton stated (Tr. 181) that as to turkeys rejected by the Army a permit might be obtained for a resale and that the rejections might amount to about 1% of the turkeys handled. The court made the remark that this would come under the head of de minimis non curat lex.

Mr. Thad R. Perry testified (Tr. 206) that he was engaged in the same kind of business as Mr. Norton, as an independent dealer in Seattle, and that before

this order came out (Tr. 208) the charge was 30c to 35c per head for handling turkeys. He stated that just before the order in question became effective, he dressed tom turkeys that averaged 35 pounds and that if compelled to charge the grower according to the terms of this order, the amount would be $1.05 per head instead of 35 cents. He said that he refused to comply with this order.

> "We said that we did not wish to be a party to a confiscation of the farmer's property." (Tr. 209).

This witness explained further the effect on the business and the resulting discrimination between the cooperatives and the independent dealers.

There was other testimony of other witnesses as to the unreasonableness of the order.

The Court regarded the Appellant's application as a bill for discovery, and after hearing all the evidence in this and the companion case, concluded that a full disclosure had been made by the Appellees, that there remained nothing for the Appellant to discover, and dismissed the case.

SUMMARY OF ARGUMENT

In passing on the application for an Order to Show Cause why the Appellant should not be permitted to examine the books and records of the Appellees, the Court acted in a judicial capacity, not ministerially.

There was no legal basis for the application, since Order G-93, on which it was based, was illegal and void, and had been, in effect, annulled before the date of the hearing.

Assuming that a lawful basis for the application existed, such disclosures were made by the Appellees in the course of the hearing as to make unnecessary an inspection of their books and records, and thus the question before the Court became moot.

ARGUMENT

Appellant's Point I—The Function of the Court

The Appellant argues, in effect, that the Court had no judicial function to perform, and that when the application for the Order to Show Cause was presented it should have been granted without any investigation. At page 12 of the brief it is stated:

> "The Act does not provide or even intimate that the Administrator's right to inspect may be defeated by the testimony of a party as to any facts sought to be elicited by the inspection, or that the Administrator may be compelled to accept any such testimony in lieu of the inspection."

That is tantamount to saying that no matter how fully detailed and complete a disclosure the Appellees might have made, still the order should have been granted under the plain provisions of the Act. This

seems to go beyond the requirements of the Act. Sec. 202 (a), quoted at pages 2 and 3 of the Appellant's brief, authorizes the Administrator "to obtain such information as he deems necessary or proper to assist him in prescribing any regulations or order under this Act, or in the administration or enforcement of this Act and regulations, orders, and price schedules thereunder." It is further argued on page 13 of the Appellant's brief that the rights of the Administrator in this matter of inspection are "as broad and free from limitation as language can make them," and that, "No substitute for this inspection is provided or contemplated by the Act." Again, at page 14, emphasis is placed on the provision to the effect that the Administrator may call for such information **as he deems necessary;** and, on the same page, the statement of the Court to the effect that it appeared to the Court that all the information required was disclosed is criticized as erroneous. Finally, on page 14, the argument is summarized in this sentence:

> "Thus the Court concluded that it had the right to pass on both the character and quantum of the information sought by the Administrator and that it had the further right to impose on the Administrator the testimony of Appellees in lieu of the inspection of Appellees' original records and documents."

If the Court had no right to pass on the character and quantum of the evidence submitted, what was the province of the Court? The answer is, to act ministerially, only, as a cog in the chain of enforcement of the Act. The meaning of this contention of the Appellant is left in no doubt. The same idea is expressed over and over again in different language. At page 15 it is said that the Court had no authority to "determine what information must satisfy the Administrator. The information which Congress authorized the Administrator to secure was that which he deemed necessary and not that which the learned Court below deemed necessary."

An examination of the decisions cited and commented upon by the Appellant shows that they do not sustain his theory. In none of the cases is it held that the Court has no authority in the premises other than to determine constitutional questions, as suggested at page 17 of the brief. Reference is hereby made to a few of them as typical of all.

Walling v. Ralbal Corp.,
135 Fed. (2) 1003

This was a proceeding to compel obedience to a subpoena duces tecum. The Court said in the course of the opinion, "it is true, of course, that the data sought by a subpoena duces tecum must be relative to the inquiry at hand **and that the use of this power**

must at all times be closely confined to the rudimentary principles of justice." It is said that the Act gives the Administrator an initial discretion in the issuance of a subpoena duces tecum, which, **if used soundly and properly** for the statutory purpose, will be upheld by the Courts and that a subpoena so issued will be enforced.

Bowles v. Glick Bros. Lumber Co.,
146 Fed (2d) 566

This was an action for a penalty. An investigation had been made and it was claimed that there had been an unlawful search and seizure. That was the only point under consideration. It was held that the Administrator did not act oppressively.

Bowles v. Insel,
148 Fed (2d) 91

Paragraph 1 of the syllabus of this case reads as follows:

> "Generally, without a showing of probable cause to believe that the law has been violated and specific description of the papers and records to be produced, a subpeona requiring the production of private papers is violative of the provision against searches and seizures."

That is all there is in the case, except that the records in question were held to be quasi-public records.

Martin Typewriter Co. v. Walling,
135 Fed. (2d) 918

This came up on a motion to dismiss on the ground that the Administrator was not authorized to act in the premises. The motion was denied and this was affirmed on appeal, because the Answer "did not put in issue the scope of the subject or the relevancy of the data therein described."

Mississippi Road Supply Co. v. Walling,
136 Fed. (2d) 391

In this case it is held that the issuance of an order upon refusal to obey a subpoena is not mandatory.

U. S. vs. Kauten,
133 Fed. (2d) 703

Here it appears that there was a full investigation by the Court.

It is submitted that Congress did not intend or attempt by the Act in question to deprive the Courts of the exercise of judicial power in dealing with such features of the enforcement of the Act as might be brought before them, and that no Court has so held, and that this becomes plain when the opinions are read as a whole and the nature of the cases observed, instead of wrenching portions of the opinions from the context. Indeed, in such a case, the application invokes the exercise of the judicial function, since the Appli-

cant seeks an Order to Show Cause why it should not be adjudged that the Respondents should permit the inspection. Under the construction of the Act urged by the Appellant relating to the duty of the Court, no such application should be made, it being enough for the Appellant to suggest to the Court that he had demanded the inspection, that it had been refused, and to present to the judge an order for him to sign on the dotted line commanding the respondents to permit the inspection. Thus a hearing becomes meaningless. Congress has gone pretty far toward delivering the American public into the power of numberless boards, bureaus, agencies and commissions, but not quite far enough, fortunately, to emasculate the Courts of the land altogether. Our Courts are still open and functioning in such matters as in others.

In view of the record in this case, the absurdity of reducing the Court to a purely clerical position in the practice of enforcing the Act and thus requiring the judge to issue an order commanding obedience to the demands of the Administrator becomes a glaring one.

The application was based solely on Order G-93 which was void.

On each and all of the grounds assigned by the Appellees: It violated the long established practice in the business. It discriminated between the independent operators and the cooperatives. It, in effect,

attempted to confiscate the property of the independent operators and to deprive them of their property without due process of law. On all these general grounds it was void. But aside from these, there remained the further fatal reason, namely: that it was issued without authority of law, without a legal basis, since the Price Control Act was designed to fix maximum prices, not minimum prices, and here a definite price was fixed. As to this there was no room for a misunderstanding, it being stated that the prices fixed in the order were the only prices which might be charged, the word "only" being emphasized in the text. The unfairness and absurdity resulting from an attempt to put such a provision in operation was clearly shown without dispute in the evidence submitted by the Appellees. As soon as the true character of the order became known to the main office in Washington it was nullified by the modification of October 2nd.

Miss Gallagher referred to injunctive relief. Obviously that could not be had, since the period from May 8th to August 14th had passed and the Appellees were not attempting to comply with the order, and at the time of the trial were operating under the modification. Therefore no purpose could be served under an order for the examination of the books and records of the Appellees, except possibly to uncover evidence which might be used as a basis for an action for a

penalty or for a criminal prosecution. In fact, Miss Gallagher frankly stated that the inspection was sought as a basis for **some kind** of a lawsuit against the Appellees.

Conceding for the sake of the argument the widest latitude to the powers vested in the Appellant in the enforcement of the Act, it must be admitted that by the record here no showing is made that a necessity existed for granting the application, even if it be argued that a sufficient disclosure was not made, since if he had a case against the Appellees the remedies afforded by the practice in an ordinary action for the recovery of a penalty or in a proceeding for the imposition of punishment were available to him. Elaboration on this point is not necessary. The Appellees having admitted non-compliance with the order, a complaint could be filed against them for the purpose of assessing penalties, and thereupon they could be subpoenead duces tecum with all their records. Again, the Appellees having admitted violation of the order, an indictment or information could be predicated on that admission.

APPELLANTS POINT II—The sufficiency of the disclosure

At the trial of this and the companion case it developed, aside from the void character of the order, that if any reason for the application existed at the time of the initiation of the proceedings, it ceased to exist

during the course of the hearing, and thus the whole matter became moot and there was no longer anything before the Court. This was so because on the 2nd day of October, 1944 the obnoxious feature of the order was nullified by the head office of the OPA at Washington (according to the Court, as a result of the attack upon the order in this and the other case). The Appellants promptly complied with the order as modified. So there was no basis for an injunction. They admitted non-compliance from the beginning and until the date of the modification. Nevertheless, the Appellant's attorney stated that Appellant desired to obtain some sort of information as a basis for some sort of a lawsuit, that is, he asked for discovery. Discovery of what? Not of evidence bearing on the question of whether or not the Appellees had violated the order, because the violation was admitted. To ascertain the amount of sales by the Appellees during the period in question? No evidence on that score was needed, because it appeared without dispute that the Appellees had after May 8th, as before, sold all their merchandise to the Government for the use of the armed forces, which was, of course, a notorious transaction, all the features of which were open to the Applicant and doubtless well known to him. It will not do to say that because some of the turkeys were rejected by the Government therefore this order should be granted to ascertain to what

extent the Appellees had violated G-93 in dealing with such rejected portion, since the rejection amounted to only about 1% of the entire amount sold to the Government during the period in question, namely: **three months and six days.** The Court properly applied to that feature the maxim of de minimis non curat lex.

The Court adjudged that the case should be dismissed because a full disclosure had been made, and mentioned also the financial responsibility of the Appellees. While these were proper and sufficient grounds for the dismissal, a complete reason for the dismissal was the invalidity of the order. Referring to it once more: By its terms the independent operator was commanded, under the pains and penalties of the Act, to charge the grower an excessive and unreasonable amount for handling turkeys—up to $1.05 per head! Of course the grower would not stand for any such imposition, especially when he could deal with a co-operative on a reasonable basis. Result, disappearance of the business of the independent operator. No wonder Mr. Norton said on the witness stand that it was unbelievable to him that such an order could possibly be issued requiring the operator to charge the grower a price in excess of what it cost him to handle the turkeys. Somebody had a brainstorm!

No legal right exists for the granting of the order applied for; no necessity exists for its issuance; no

public benefit could possibly accrue therefrom, while on the other hand the result would be expense and annoyance to the Appellees.

The judgment should be affirmed.

Respectfully submitted,

B. G. SKULASON,

Attorney for Appellees.